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No. 01-1303

Supreme Court, U.S.
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In The

Supreme Court of the United States

DARWIN GREEN, et al.,

Petitioners,

v.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF RESPONDENTS, RICHARD T. FIELDS, M.D., STEWART P. AXELBAUM, M.D., AND HARSHAD R. MODY, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS, RICHARD T. FIELDS, M.D., STEWART P. AXELBAUM, M.D., AND HARSHAD R. MODY, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Richard T. Fields, M.D., Stewart P. Axelbaum, M.D. and Harshad R. Mody, M.D., respectfully request that this Court deny the petition for writ of certiorari.

COUNTERSTATEMENT

Because of the alleged negligence of other health care providers, with whom Petitioners long ago settled their claims for a significant sum, Darwin Green (hereinafter "Green") sustained a devastating brain injury that left him in a persistent vegetative state.[1] Pet. App. 2a-5a. When Petitioners subsequently sought to recover additional money damages against the present Respondents in a Maryland state court of general jurisdiction, the trial judge recognized the risk that the compelling nature of Green's injuries would likely prevent a jury from objectively evaluating Petitioners' vaporous liability case against Respondents. The trial judge therefore ordered a bifurcation of the issues of liability and damages, for separate trials. Petitioners never challenged this ruling on appeal.

Petitioners do not dispute that, when this case came to trial before a jury on the issue of liability, Green was incapable of communicating with counsel or assisting

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[1] Respondents adopt and incorporate by reference the accurate recitation of the facts regarding Green's medical history as set forth in the opinions of the Maryland Court of Appeals and the Maryland Court of Special Appeals. Pet. App. 3a-4a; 72a-76a.

them in any manner. Pet. App. 163a, 168a. In their petition, they liken this adult to a one month old child. Twitching, unresponsive and uncomprehending, Green required the attendance of nurses and frequent, disruptive suctioning of his tracheostomy site. Pet. App. 173a-174a. Respondents concluded, with ample justification, that Green's presence in the courtroom would serve no rational purpose, but would evoke jury sympathy, would be potentially disruptive, and would effectively undercut the ruling bifurcating the trial. Accordingly, Respondents presented a motion to the trial court addressing the irremediable prejudice that would flow from Green's presence at the liability portion of the trial, which the trial court granted.

A. Petitioners' Conflicting Arguments in the Lower Courts

Petitioners fail to articulate a standard that they contend this Court ought to adopt to govern a trial court's determination of whether and when a plaintiff to a civil action may be barred from the liability phase of a trial. Moreover, Petitioners' positions below were inconsistent regarding the claimed bases of Green's right to be present during all phases of his civil trial. Even a tea leaf reading of Petitioners' arguments at trial fails to reveal the bases that Petitioners now assert support Green's right to have been present during the liability phase of the trial. Petitioners' position at trial, that Green was an essential piece of evidence necessary to prove their case, is nowhere to be found in their argument regarding why this Court ought to hear this matter.

At the trial court, Petitioners never argued that Green had an absolute right granted by the Constitution to be present during the liability phase of the trial. Rather,

Petitioners claimed that "a party to a civil action should have a *reasonable opportunity* to attend its trial." Pet. App. 146a (emphasis added). Petitioners acknowledged that trial courts have discretion, circumscribed by the due process clause, to limit a plaintiff's presence during the liability phase of a trial. Indeed, Petitioners argued in their written opposition to the defendants' motions in limine that the appropriate standard to be applied by the trial court in deciding whether he could be excluded during the liability phase of the trial was to be found in *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985), *cert. denied at* 474 U.S. 981 (1985), a position that they now apparently abandon. Pet. App. 146a-147a.

Petitioners claimed before the trial court that Green would be prejudiced if he were excluded from the trial, not because he would be deprived of a liberty interest,[2] but because his exclusion would prevent his counsel from using him as evidence to prove his case. Petitioners sought Green's presence solely to "prove" the elements of his medical malpractice claim against the defendants. Pet. App. 148a-149a. Petitioners argued that his presence was necessary so that the jury could see that his "current condition proximately resulted from the Defendants' breach of duty," to prove that the defendants' alleged conduct was the "legal cause of . . . his injuries," and to "establish the standard of care the Defendants were obligated to undertake." Pet. App. 149a-150a.

Although Petitioners argued briefly in their written opposition that, by barring Green from the liability phase

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[2] As a practical matter, since he lacked the ability to understand the proceedings, to participate in the trial, or to make a conscious decision whether he wished to be present or not, he could not truly exercise a "right" to be present.

of the trial, the trial court would be violating the Americans With Disabilities Act, they presented no coherent argument regarding what remedy would be available to them for such a violation, besides making the veiled threat that the trial judge himself might be personally liable to them for such a ruling. Pet. App. 150a-151a.

The final argument that Petitioners made in their opposition to the motions in limine was that the right to an "open trial" precluded an order from the trial court excluding Green from the courtroom. Pet. App. 151a-152a. Again, however, even though Petitioners claimed a right rooted in the Constitution – public access to trials – the lodestar of their argument remained that Green's presence was "a necessary aid to his counsel in presenting the elements of his liability claim." Pet. App. 152a.

At the pretrial hearing on the motions in limine, Petitioners again focused the trial court on Green's role as evidence. In response to the court's inquiry regarding why Petitioners sought to have Green present, Petitioners' counsel said that:

> [I]n the liability aspect of a trial, it is necessary that we also prove the damage. And not only that, but that the damage was foreseeable. . . . His condition, as he lives today, is something that is foreseeable for a child with hydrocephalus with a shunt in place, and that shunt may be malfunctioning.

Pet. App. 163a. Petitioners' counsel emphasized the point later by saying:

> The reason for having the Plaintiff here, Your Honor, is the element of proof of the foreseeability of the damages for someone in Darwin's situation when he walked into North Arundel Hospital on August 18, 1988 and the

> fact that even in liability, the issue alone, we have to prove the damages in fact occurred. And we can do that both by not only testimony, not only by medical records, but also by the presence of the Plaintiff himself.

Pet. App. 167a.

In this Court, Petitioners express outrage that the Maryland Court of Appeals stated in its opinion that, in the courtroom, Green would have amounted to no more than "an exhibit – a piece of evidence – that is both irrelevant and prejudicial, and thus invokes the balancing process enunciated in Maryland Rule 5-403." Pet. App. 30a. The Court of Appeals, however, merely demonstrated its familiarity with Petitioners' argument in the trial court, in the intermediate appellate court, and before the Court of Appeals that cast Petitioners' desire for Green to be present as evidentiary, and not as a sincere exercise of a Constitutional right. Counsel for Petitioners clearly emphasized before the trial court his desire to use Green solely as evidence to prove elements of his case.

In their appeal of the trial court's decision to the Maryland Court of Special Appeals, Petitioners began to shift ground, primarily in emphasis. On the issue of Green's exclusion from the trial, Petitioners put forward the trial court's alleged violation of the Americans With Disabilities Act as their first argument. Resp. App. 16-22. Petitioners again made no coherent argument regarding how the Act would give them relief in the form of the reversal of a civil judgment.

Next, Petitioners stuck by their assertion that "a party to a civil trial has a reasonable opportunity to attend its trial." Resp. App. 22. They put forward *Helminski* as the primary case providing the appropriate analysis where the trial court is determining whether to exclude a plaintiff from the liability phase of a trial. Resp.

App. 22-25. Petitioners argued once again that the prejudice Green suffered as a result of the exclusion was that he was the "best evidence" to be introduced to establish his liability claim. Resp. App. 26-28. Petitioners concluded their "evidence" argument by saying: "Judge Rushworth's barring of Green *from attending his own trial to demonstrate his condition* prevented his attorneys from appropriately establishing the duty, standard of care, and proximate cause elements of his liability claim." Resp. App. 28 (emphasis added).

Finally, Petitioners argued that the Constitution requires public access to trials, and that the trial court violated the Constitution by barring Green from the courtroom. Resp. App. 29. They claimed that they sought Green's presence not to vindicate that right, however, but because he "would have been a necessary aid to his counsel in presenting elements of his liability claim." Resp. App. 29.

In affirming the trial court's ruling on the motion in limine, the Court of Special Appeals held that "there is nothing in the ADA that provides a basis for reversing the judgment of a lower court in a civil dispute between private parties." Pet. App. 90a. Petitioners invited the Court of Special Appeals to apply the *Helminski* analysis to the facts of this case and it did, but it held that the trial court "went to great lengths to ensure that Darwin's constitutional rights were not violated" and affirmed the trial court's decision. Pet. App. 96a. Finally, the Court of Special Appeals held that the public's right to attend trials is not absolute, and, since the trial court found that his presence would prejudice the proceedings, "there was no abuse of discretion in barring Darwin from the courtroom." Pet. App. 97a.

Petitioners sought and obtained review in the Maryland Court of Appeals. There, Petitioners again asserted the ADA claim as their first argument, but, like before, presented no coherent support for the proposition that an ADA violation would permit the reversal of a civil judgment between private parties. Although not highlighted in Petitioners' brief as it had been before, the "Darwin Green as evidence" argument was included. Petitioners again urged the application of the *Helminski* analysis, this time asserting that both the trial court and the Court of Special Appeals had failed to implement the analysis properly – that is, Petitioners disagreed with the facts found by the trial court. Finally, they claimed that the right of public access to trials had been violated by the courts' rulings that the exclusion of Green from the courtroom was appropriate.

For the first time, however, Petitioners also argued that Green had been denied the right to confront witnesses, that the First Amendment guaranteed him the right to petition the government and thus to have access to the courts, that the court ought to apply an equal protection analysis to the case under strict scrutiny review, and, finally, in light of the enactment of the ADA, the *Helminski* analysis ought to be abandoned.[3] The Court

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[3] Also for the first time Petitioners argued that they had sought to have Green present "for a period of time less than an hour, on one day of the trial." Pet. App. 14a-15a. The Court of Appeals noted this new argument and suggested that, had Petitioners wished to have Green present throughout the trial, then a different case might have been presented, and the trial court "may well have been concerned about the disruptive effect of suctioning his air tube – the noise and the jerking movement that the court observed on the video." Pet. App. 15a n.4. However, since Petitioners stated before the Court of

of Appeals did not accept Petitioners' invitation to examine these new issues. Instead, like the Court of Special Appeals, the Court of Appeals held that nowhere in the ADA, or in the regulations promulgated thereunder, is there a remedy permitting the reversal of a judgment entered in a civil case between two private litigants. Pet. App. 19a. On the issue of whether the trial court complied with the due process clause in its determination that Green could be excluded from the trial, the Court of Appeals applied the *Helminski* analysis and found that the trial court did comply with the dictates of due process. Pet. App. 29a-30a.[4]

Not only do Petitioners fail to state what they believe the standard ought to be for determining whether a plaintiff may be excluded from the liability phase of a trial, but they also fail to discuss in the Petition how Green's presence in the courtroom could have affected the outcome of the trial. North Arundel Hospital and Dr. Mody were granted judgment at the midpoint of the trial on the basis that there was legally insufficient evidence of negligence on their part to take the case to the jury. Pet. App. 2a, 71a, and 98a. The jury did consider the case against Drs. Fields and Axelbaum, but it answered " 'no' to the special verdict form question, 'do you find the plaintiff has proven that [either Dr. Fields or Dr. Axelbaum] departed from accepted standards of care in the treatment of Darwin Green?' " Pet. App. 98a. Petitioners never

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Appeals that they only wished to have Green present for less than an hour on one day of the trial, it did not engage in an analysis of whether the trial court could properly have found that Green's presence in the courtroom throughout the trial would have been disruptive. Pet. App. 15a.

[4] The court did not address the public access to the courts issue, but Petitioners do not challenge that here.

challenged on appeal the propriety of the trial court's grant of judgment in favor of North Arundel Hospital and Dr. Mody.[5] Thus, the jury was not compelled to reach the causation issues which, according to Petitioners' arguments at trial and in the intermediate appellate court, demanded Green's presence as an exhibit. If one excludes the impermissibly prejudicial effect on the jury of a vegetative, uncomprehending, wheel-chair bound patient, uncontrollably jerking his limbs as nurses suction his tracheostomy, it is difficult for Petitioners to mount a cogent argument that the jury's determination that neither Dr. Fields nor Dr. Axelbaum was negligent would have been different if Green had attended trial.

B. Basis for Respondents' Pre-Trial Motion

Petitioners argue that Respondents and the trial court had "no cause for concern" regarding the appearance of Green in the courtroom. They have mischaracterized Respondents' pre-trial motions which addressed the presence of Green during the liability phase of the trial. Pet. 5. Fundamentally, Petitioners, unhappy with the trial court's factual determinations and the exercise of its discretion, are groping for a constitutional device to compel a different outcome.

Preliminarily, it is important to note that the trial court was so concerned about the potential for unfair prejudice to Respondents engendered by Green's injuries and damages that it entered an order bifurcating the case

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[5] With regard to Dr. Mody, judgment was granted in his favor because Petitioners failed to prove a factual predicate to support any opinion of their expert that Dr. Mody breached the applicable standard of care. Pet. App. 73a-74a.

for separate trials on liability and damages. Pet. App. 71a. This was a critical threshold in the procedural history of the case – one which set the stage for a subsequent examination by the court of whether the need for Green's presence at the liability phase of the trial outweighed the potential for unfair prejudice to Respondents resulting from his presence.

Respondents' motions rested on the uncontested fact that Green was in a vegetative state, unable to communicate, assist counsel, or to understand the proceedings in any way.[6] The motions rested in part on the undisputed fact that Green required constant skilled medical care, with an array of noisy medical equipment, that would inevitably have disrupted the proceedings and created a distraction for the jury. Implicit in the decision to bifurcate the trial was the court's valid concern that Green's physical appearance and condition would unfairly prompt the jury to prejudge the liability issues in the case in favor of Petitioners. Respondents' motion asked the court to weigh the risk of jury prejudice flowing from the inevitable and unavoidable sympathy generated by Green's physical appearance and condition against any need to have him present during the liability phase of trial. Pet. App. 155a-159a.

C. The Trial Court's Findings

To fully and fairly assess the danger of unfair prejudice to Respondents, and to balance that against Petitioners stated need to present Green as an element of proof during the liability phase of the trial, the trial court received evidence and made findings of fact. The court

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[6] Green's counsel recognized that Green functions at the level of a one-month-old. Pet App. 163a.

reviewed medical records of Green and deposition transcripts. Pet. App. 172a. Petitioners asked the trial court to watch a "day in the life" video tape of Green that they had produced for use at trial, so that the court could observe first-hand Green's condition and capabilities. Pet. App. 163a, 166a. This strategy back-fired on Petitioners because it provided one of the evidentiary cornerstones of the trial court's ultimate determination on the issue of prejudice.

Based on the documentary evidence, sworn deposition testimony, and the viewing of the "day in the life" video,[7] the court found that Green existed in a vegetative state, unable to communicate in any way, to comprehend or appreciate the proceedings, or to assist counsel in any manner. Pet. App. 173a-174a. Further, the court observed that Green is fed through a feeding tube, that he requires his airway to be suctioned as often as every two hours, and that he would require the attendance of at least one nurse during trial. The court also noted that when his airway is suctioned, "there is a jerking movement that lifts his legs and the extension of his arms above and about the bed he lies in." Pet. App. 173a. Finally, the trial court found that the presence of Green would create an exceedingly powerful sense of sympathy in the jurors, which would be beyond the repair of any cautionary

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[7] As the Maryland Court of Appeals noted in its Opinion below in this case, "A trial judge's viewing of a video prepared by the plaintiffs showing a 'day in the life' of the disabled plaintiff in lieu of actually observing the plaintiff in person has been held to allow sufficient fact-finding by the trial judge in order to decide whether the plaintiff's presence at the liability phase of the trial would be prejudicial. *See Reems v. St. Joseph's Hosp. and Health Ctr.*, 536 N.W.2d 666, 670 (N.D. 1995)." Pet. App. 94a.

instruction the court could give them, and which would amount to prejudice to the Defendants. Pet. App. 174a-175a.

D. The Trial Court's Legal Analysis

There were no Maryland precedents establishing a legal framework for the court's evidentiary findings regarding the issue of Green's presence at trial. As a result, the trial court examined persuasive authority from other jurisdictions and ultimately turned for guidance to the thoughtful and well-reasoned analysis in *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985), *cert. denied*, 474 U.S. 981 (1985). Pet. App. 172a. The overwhelming majority of state appellate courts and federal trial and appellate courts that have had occasion to visit this issue have followed the formula established in *Helminski*.

Helminski analyzed the constitutional propriety of the trial court's exclusion of a severely retarded and autistic party from the liability phase of a bifurcated trial. It was alleged at trial that the injuries which led to his retardation and autism were caused *in utero* by the manufacturers of a surgical anesthetic to which his mother, a certified registered nurse, was exposed during her pregnancy. The minor plaintiff in *Helminski* was handicapped to the point that he could not speak and was not toilet-trained. The U.S. District Court excluded the plaintiff from attending the trial, and the jury ultimately found no liability as to the defendants. The plaintiffs appealed to the Sixth Circuit Court of Appeals contending that the trial court's exclusion of the plaintiff violated his Fifth and Seventh Amendment rights.

The Court of Appeals for the Sixth Circuit observed that neither the Fifth nor the Seventh Amendments confer upon litigants an absolute right to be present at trial, and

that there exist certain circumstances which would justify the exclusion of a party. *Id.* at 213-14. To establish a clear line of demarcation, the Sixth Circuit identified the circumstances that would *not* justify exclusion. As a threshold matter, the Court stated that healthy parties, who do not suffer from any physical or mental impairment, cannot be excluded from trial on an arbitrary basis. *Id.* at 214. Next, the Court held that a party cannot be excluded based on that party's physical appearance, however pitiable, where the party can assist counsel or comprehend the proceedings, even where the appearance of the plaintiff may result in jury prejudice, unless the exclusion of the plaintiff is to avoid disruption or to preserve decorum in the courtroom. *Id.* at 214-15.

Having identified the situations in which a plaintiff may *not* be excluded from the liability phase of a bifurcated trial, the Court then identified the extremely limited circumstances under which a party *may* be excluded from the liability phase of trial.[8] First, the defendant must establish that the plaintiff's appearance or conduct would result in prejudice by impairing the jury's performance of its fact-finding task. If the court determines that the plaintiff's presence would be prejudicial, the court next considers whether the plaintiff can understand or comprehend the proceedings, or assist counsel. If the court finds that the plaintiff can comprehend the proceedings, or assist counsel, then exclusion of the plaintiff will be inappropriate, regardless of any impact of prejudice. If, however, the plaintiff cannot understand the proceedings or assist counsel, then it is within the court's discretion to

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[8] The Court in *Helminski* recognized that it is not appropriate to exclude a plaintiff from the damages phase of a trial.

exclude the presence of the plaintiff from the liability phase of the trial. Thus, the *Helminski* court narrowly drew its holding, setting out an extremely limited set of circumstances under which the trial court may properly exercise its discretion on the issue of exclusion. The *Helminski* court was critical of the factual underpinnings of the trial court's decision (it was based only on a description of the plaintiff's condition, and did not involve observation in person or by video tape, as occurred here). In the factual setting of that case, this deficiency was held to be harmless error, and the judgment was upheld. *Id.* at 218.

The *Helminski* court identified very limited circumstances under which a trial court has discretion to exclude a party from the liability phase of trial, provided clear evidentiary guideposts for fact-finding by the trial court, and set forth a clear formula to aid in the determination of whether those circumstance exist in a given case. In their petition, Petitioners fail to note that this Court denied a petition for a writ of certiorari at 474 U.S. 981 (1985).

Following the circumscribed path marked out in *Helminski*, the trial court carefully evaluated the evidence presented, as well as the reasonable inferences derived therefrom, and found that the moving parties had carried their burden of proof. Green clearly satisfied the *Helminski* exclusion criteria for the liability phase of the trial. Exercising its discretion within constitutional bounds, the trial court ruled that, in the limited factual setting of this case, Green's presence would deny Respondents their due process right to a fair trial of the liability issues in this bifurcated case.

E. The Appellate Holdings in this Case

In their effort to obtain review by this Court, Petitioners distort the carefully-crafted, narrow holdings of the Maryland Court of Special Appeals and the Maryland Court of Appeals in this case. Contrary to Petitioners' suggestion, the decisions of these courts on the issue of exclusion closely followed the holding of *Helminski* and were firmly anchored in precedent from other jurisdictions.

The Maryland Court of Special Appeals affirmed the trial court's ruling to exclude Green at 126 Md. App. 394, 730 A.2d 221 (1999) (Pet. App. 68a-101a), approving of the trial court's application of *Helminski* to its findings as an appropriate means of balancing the interests of the parties and preserving due process on both sides. The Court of Special Appeals examined the rationale supporting the analysis in *Helminski* (Pet. App. 90a-94a), reviewed the trial court record, and concluded that, "[a]pplying the *Helminski* analysis to the case at bar, we find no constitutional violation in Green's exclusion from the liability portion of the trial." Pet. App. 94a. The Court of Special Appeals praised the trial court's care and effort "to ensure that Darwin's constitutional rights were not violated by arbitrarily excluding him from trial." Pet. App. 96a. Petitioners did not assert an equal protection argument either before the trial court or the Court of Special Appeals. Resp. App. 1-39. As they had in the trial court, Petitioners contended that the exclusion of Green prevented them from exhibiting him to the jury in support of elements of their *prima facie* case. The assertion that Green's due process right to be present was violated by the trial court, which is so emphatically trumpeted in the present petition, was not clearly articulated in Petitioners' brief to the intermediate appellate court.

Maryland's highest court granted a writ of certiorari, and, like the intermediate appellate court, affirmed the ruling of the trial court. *See Green v. North Arundel Hosp. Ass'n., Inc.*, 366 Md. 597, 785 A.2d 361 (2001). Pet. App. 1a-67a. The Court of Appeals embraced the *Helminski* framework, as the trial court and intermediate appellate court had done, recognizing that the trial court had properly undertaken fact-finding, appropriately followed precedent, and had acted well within the discretion with which it is endowed in such matters.

The Maryland Court of Appeals agreed with the Sixth Circuit that the right of a party to attend trial is not absolute. However, a plaintiff's appearance alone will never justify the exclusion of that plaintiff from the liability phase of trial, even if prejudice will result, where the plaintiff is able to aid counsel or comprehend the proceedings. Following *Helminski*, the Maryland Court of Appeals stated that there must be a confluence of five factors as a predicate to the exercise of the court's discretion on this issue:

> In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding. When all of those circumstances exist, as they did here, the

> plaintiff's presence is not truly an exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard. His presence is rather as an exhibit – a piece of evidence – that is both irrelevant and prejudicial. . . . There was no abuse of discretion here.

Pet. App. 29a-30a (emphasis in original).

Here, in the liability phase of a bifurcated trial, the trial court rested its findings on documentary evidence and its own observations of Green in the "day in the life" video, which *plaintiffs* created and asked the court to view. The trial court found that Green suffers from a severe mental and physical handicap, which Petitioners attributed to Respondents. The trial court determined that the presence of Green in the courtroom would generate such jury sympathy that Respondents would be incurably prejudiced, despite cautionary instructions to the jury. The trial court further found that Green is in a persistent vegetative state, unable to assist counsel or to comprehend the proceedings. The Maryland Court of Appeals specifically recognized that Green was only excluded from the liability phase of the trial because the facts of this case satisfied *Helminski's* narrow set of elements which must be established in order to exclude a party from the liability phase of a bifurcated trial. Pet. App. 30a.

It is unclear whether Petitioners concede that the holding in *Helminski* passes constitutional muster, or not. Their suggestion that the criteria adopted by the Maryland Court of Appeals is more "lenient . . . in allowing the involuntary exclusion of a party" (Pet. 22) than *Helminski* is simply belied by side-by-side comparison of these two decisions. If *Helminski* articulates a standard that satisfies

due process, it follows that the virtually identical standard adopted by the Maryland Court of Appeals is equally availing. If Petitioners are now challenging the holding in *Helminski*, it represents a departure from their reliance on the holding in this case in both the trial court and the Court of Special Appeals. Pet. App. 146a-150a; Resp. App. 22-25. Since this Court denied certiorari in *Helminski* more than sixteen years ago, that seminal Sixth Circuit decision has been followed and applied across the United States. *See, e.g., Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472 (1st Cir. 2000); *Gonzalez-Marin v. Equitable Life Assurance Soc.*, 845 F.2d 1140 (1st Cir. 1988); *Bremner v. Charles*, 312 Ore. 274, 821 P.2d 1080 (1991); *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. Ct. App. 1987); *Caputo v. Joseph J. Sarcona Trucking Co., Inc.*, 204 A.D.2d 507, 611 N.Y.S.2d 655 (1994); *Burks v. Harris*, 1992 WL 322375, 1992 Tenn. App. LEXIS 913 (Tenn. Ct. App. 1992). Plaintiffs have not cited a single case concerning the issue of a party's presence at the liability phase of a bifurcated trial in which the holding in *Helminski* was disregarded or directly challenged.

What are the Petitioners asking this Court to do? If the right of a party to be present is not absolute, as they appear to concede, what test should be applied to determine when exclusion is constitutionally permissible? What constitutional flaws can Petitioners identify in the *Helminski* analysis, as adopted by the Maryland appellate courts? Contrary to Petitioners' assertions, the trial court not only made specific findings on each *Helminski* element, those findings were fully supported by the record. The history of this litigation has been driven and defined by Petitioners' constantly shifting and evolving theories to attack that outcome, which they find unacceptable. Stripped to its essence, Petitioners are simply disgruntled with

the trial court's fact-finding and the exercise of its discretion.

If the largely undisputed findings regarding Green's mental status and appearance, as well as the court's conclusions regarding likely jury prejudice, would not constitutionally justify exclusion in this bifurcated case, what findings do Petitioners contend would support exclusion? What attributes, in Petitioners' view, would a party require which would constitutionally permit exclusion, and are lacking in Green? Although Petitioners do not openly argue that every party has an absolute right to attend trial, their true position here is little more than thinly disguised absolutism – an approach that has never been accepted by any appellate court in a reported decision involving the presence *vel non* of an uncomprehending, uncommunicative plaintiff in the liability phase of a civil action.

REASONS TO DENY THE PETITION

I. THERE IS NO CONFLICT AMONG THE STATES AND LOWER FEDERAL COURTS

Petitioners argue that this Court should grant a Writ of Certiorari because state courts, as well as the U. S. Courts of Appeals for the First and Sixth Circuits, are in conflict as to the issue at hand.

A. There is no Conflict Between the First and Sixth Circuits

Petitioners assert that the decision of the Maryland Court of Appeals, as well as the Sixth Circuit's holding in *Helminski*, are in conflict with the First Circuit. Pet. App. 14-15. The Petition cites only two First Circuit cases: *Gonzalez-Marin v. The Equitable Life Assurance Soc.*, 845

F.2d 1140 (1st Cir. 1988), and *Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472 (1st Cir. 2000). Pet. App. 16, 19. An examination of those decisions fails to support Petitioners' claim of a conflict, and reveals that these opinions are in complete harmony.

1. In *Gonzalez*, the First Circuit found no error in the trial court's *refusal* to exclude a party who suffered from catatonic schizophrenia. There, the trial court's determination and the appellate court's holding were based on the defendant's failure to show that the presence of the plaintiff would prejudice the jury. The court, in *Gonzalez*, explicitly stated that its inquiry was guided by *Helminski*, and that the First Circuit is in agreement with the framework enunciated in *Helminski*. *See* 845 F.2d at 1145-46.

2. In *Rubert*, the First Circuit again confirmed that it is in accord with the holding in *Helminski*, and that the *Helminski* framework is the proper one to follow. *See* 205 F.3d at 478. *Rubert* reversed the trial court's exclusion of the plaintiff because of the absence of a record reflecting evidentiary findings and the court's basis for the exclusion. *See* 205 F.3d at 479-80.

B. None of the Cases cited in the Petition for the Proposition that a Party's Right to be Present at Trial is Absolute is Relevant or Analogous to this Case

Petitioners also contend that this Court should accept this matter for review because there are conflicts among the highest state courts with regard to the issue of exclusion. In an effort to establish support for this conflict claim, Petitioners assert that a minority of jurisdictions have held that a plaintiff has an absolute right to attend trial. Pet. App. 15-16. None of the cases relied upon by Petitioners holds that the federal Constitution provides a

litigant the absolute right to be present at a civil trial. These cases (1) were decided solely on state constitutional grounds, (2) did not deal with exclusion of parties from the courtroom, (3) did not involve *injured* parties who were excluded from trial, (4) involved no plaintiff with any type of mental incapacity, or (5) involved no party with any physical or mental injury whatsoever. Respondents adopt and incorporate by reference the discussion of these inapposite cases in the Opposition filed by North Arundel Hospital Association, Inc.

C. None of the Cases Cited by Petitioners that Held that a Party's Right to be Present at Trial is Not Absolute Conflicts with the Maryland Appellate Courts' Holdings in this Case, or with *Helminski*

Other state cases cited by Petitioners for the proposition that there is disarray among jurisdictions on the issue of exclusion are actually *in accord* with the holding of the Maryland Court of Appeals in this case, and with *Helminski*:

1. *Morley v. Superior Court*, 131 Ariz. 85, 638 P.2d 1331 (1981) (Pet. 17): In a pre-*Helminski* case, the Supreme Court of Arizona held that it is within the court's discretion to exclude a plaintiff from the liability phase of a bifurcated trial who, because of injury or disability, cannot understand or contribute to the proceedings, where the plaintiff will be fully represented by counsel. In addition, the Court stated that where the presence of such a plaintiff will prejudice the jury, the trial court's failure to exclude the plaintiff would deny the defendant the right to an unbiased jury.

2. *Purvis v. Inter-County Telephone & Telegraph Co.*, 203 So.2d 508 (Fla. Ct. App. 1967) (Pet. 17, 18): The court

held that the exclusion of an "irrational" and "somewhat argumentative" disabled plaintiff constituted error where there was no showing that he could not comprehend the proceedings.

3. *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. App. 1987) (Pet. 17): This case holds that the exclusion of a minor quadriplegic plaintiff, who required a ventilator to breathe, was appropriate where there was a showing of imminent jury prejudice, coupled with a showing of no ability on the part of the plaintiff to comprehend the proceedings or to assist counsel. This case cites and follows *Helminski*.

4. *Dickson v. Bober*, 269 Minn. 334, 130 N.W.2d 526 (1964) (Pet. 17, 19): In a pre-*Helminski* decision, Minnesota's highest court found no error in excluding the plaintiff, who had sustained severe injuries in a motorcycle accident, where the plaintiff could not comprehend the proceedings or assist counsel, and where the court determined that the presence of the plaintiff would have been disruptive to the courtroom proceedings, as well as prejudicial to the defendant.

5. *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D. 2d 507, 611 N.Y.S.2d 655 (1994) (Pet. 17, 19): This intermediate appellate court held that although the physical appearance of the plaintiff alone is never enough to exclude the plaintiff from trial, exclusion is permissible when the plaintiff can neither comprehend the proceedings nor assist counsel. This case specifically cites and follows *Helminski*.

Other cases cited by Petitioner on this issue are factually far afield of *Helminski* and the instant case and are utterly irrelevant to the constitutional question presented. For example, *Matter of Radjpaul v. Patton*, 145 A.D.2d 494, 535 N.Y.S.2d 743 (1988) is a child custody case; *Ryfeul v.*

Ryfeul, 650 P.2d 369 (Alaska 1982) is a divorce case. Pet. 16-17. Both were decided on state law grounds, did not address federal constitutional issues, and involved no parties with physical or mental disabilities of any type.

Petitioners have not and cannot cite a single state or federal case with comparable facts that departs from the reasoning and holding in *Helminski*. Courts that have applied *Helminski*, and that have sustained the trial court's exclusion of parties include *Reems v. St. Joseph's Hospital and Health Center*, 536 N.W. 2d 666 (N.D. 1995); *Bremner v. Charles*, 312 Or. 274, 821 P.2d 1080 (1991); *Province v. Center for Women's Health & Family Birth*, 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667 (1993); *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D. 2d 507, 611 N.Y.S.2d 655 (1994); *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. App. 1987). In the sixteen or more years since the *Helminski* decision was published, and certiorari was denied by this Court, these courts, like the Maryland appellate courts, have found that *Helminski*'s reasoning and methodology provided a workable approach to the problem of balancing the due process rights of civil defendants to a fair trial with the conditional right of a civil litigant to attend trial. Despite the somewhat hysterical expressions of concern in the present petition that the Maryland Court of Appeals holding, tracking *Helminski*, will invite mass exclusion of injured plaintiffs, the paucity of reported opinions on this issue in the sixteen years since this Court declined certiorari in *Helminski* strongly suggests that when this issue does arise, it occurs infrequently. If a stampede of excluded plaintiffs are expected in the wake of the Maryland Court of Appeals' decision, they would have emerged long ago, following *Helminski*. As the trial court and the Maryland appellate courts found in the instant case, *Helminski* establishes clear

guide posts that meet the requirements of due process for litigants on both sides and avoids arbitrary and unpredictable determinations.

II. A STRICT SCRUTINY, INTERMEDIATE SCRUTINY OR RATIONAL BASIS MODE OF REVIEW WAS NOT APPLICABLE TO THE MARYLAND APPELLATE COURTS' REVIEW IN THIS CASE

Petitioners argue that the Maryland Court of Special Appeals and the Maryland Court of Appeals erroneously failed to engage in a strict scrutiny, intermediate scrutiny, or rational basis review of the trial court's ruling in this case. Pet. 25. Respondents note as a threshold matter, in response to Petitioners' contention, that Petitioners never asked the trial court or the intermediate appellate court to apply an equal protection analysis; thus, Petitioners have waived the equal protection argument that they now attempt to assert through this argument.

These Respondents are unaware of any case where the levels and methods of scrutiny to which Petitioners refer have been applied to acts of the judiciary. Rather, these modes of review apply to the legislative branches of the federal and state governments, and to the statutes enacted by them. Accordingly, a strict scrutiny, intermediate scrutiny, or rational basis inquiry by the Maryland appellate courts would have been inappropriately applied to the trial court's ruling. However, even assuming, *arguendo*, that one of these standards of scrutiny should apply to the instant case, Petitioners' argument would still be unavailing. In *Clarke v. Jeter*, 486 U.S. 456 (1988), this Court stated that:

> In considering whether state legislation violates the equal protection clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a

> minimum, a statutory classification must be rationally related to a legitimate governmental purpose. . . . Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

See Id. at 461 (internal citations omitted).

Thus, even if one of these levels of scrutiny were to apply to the instant case, it would not be strict scrutiny, as there is no classification in this case that is based on race, national origin, or which affects fundamental rights. Likewise, intermediate scrutiny would not apply as there is no classification in this case that is based on sex or illegitimacy. Thus, if one of these levels of scrutiny were to hypothetically apply to this case, it would be the rational basis standard, under which a statutory classification must be rationally related to a legitimate governmental purpose. Indeed, this Court has stated that the rational basis analysis applies in cases involving the mentally retarded. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

Under a situation in which a rational basis analysis would apply to the trial court's ruling in this case, the burden would be *on the Petitioners* to show that the trial court's interest in ensuring fairness in the trial is not a legitimate interest, and that the exclusion of Green from the liability phase of trial was not rationally related to that interest. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). Petitioners

have not endeavored to make any such showing, much less succeeded in satisfying that burden.

III. THE AMERICANS WITH DISABILITIES ACT DOES NOT CREATE ANY ISSUE THAT MERITS REVIEW IN THE SETTING OF THIS CASE

Petitioners also urge that the trial court's exclusion of Green from the courtroom during the liability phase of the proceedings violated his rights under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 – 12213 (1994, 1999 Supp.) (Pet. 28-30). However, it is unclear what Petitioners wish this Court to do about this. The remedy they seek – reversal of the judgment below – is not provided in the ADA, or by any reasonable judicial gloss on that body of law. Implicitly, Petitioners seem to concede this. Any such change in the ADA must be legislated; Petitioners stop short of asking this Court to perform that function.

The portion of the ADA that is relevant here is Title II, 42 U.S.C. §§ 12131 – 12165 (1994, 1999 Supp.), which governs cases of alleged discrimination against disabled persons by public entities.[9] Section 12132 states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

---

[9] As the Maryland Court of Appeals pointed out, State courts fall under the definition of "public entity" provided by section 12131(1)(B) of the ADA, which includes any agency or other instrumentality of a State of local government. Pet. App. 17a.

Further, 28 C.F.R. § 35.130(b)(7) (1999), the pertinent federal regulation with regard to the enforcement of the section 12132 ADA requirement, states:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity.

As the Maryland Court of Appeals stated, the ADA compliance cases to date with respect to courts have been in the context of accommodation of the disabled with respect to the physical accessibility of courthouse facilities. Pet. App. 17a. Whether a court order excluding a disabled person from a trial because of a prejudicial sympathy that the person's presence would create in the jury violates Title II of the ADA has not been decided by any court, as the Maryland appellate courts recognized. However, the Court of Appeals held that issue to be moot and unnecessary to resolve, because even assuming, *arguendo*, that such an order would violate the ADA, the remedies of reversal of judgment and remand for a new trial that Petitioners seek are not available under the statute or corresponding regulations. Pet. App. 17a-18a.

A disabled person who believes that he or she has been discriminated against by a court on the basis of that disability must first file a complaint with the Department of Justice, which investigates the claim and attempts to resolve the grievance internally. *See* 28 C.F.R. 35.170-35.172. When the Department cannot resolve the issue, it issues findings of fact, and then the complaining party may file a private lawsuit. *Id.* at 35.172-35.173. Nowhere in the remedial provisions of the ADA or the

corresponding regulations are reversal of court judgments or remands for new trial provided for alleged ADA violations. The Maryland Court of Appeals was correct in its assessment that:

> The entire thrust of the administrative remedial sections is in forcing public entities to make reasonable accommodations in their facilities or in their programs to preclude the wrongful exclusion of persons with disability and are injunctive or forward-looking in nature. The remedies available in a private lawsuit, subject to Eleventh Amendment considerations, may be broader and include compensatory damages and an award of attorney's fees against the public entity, but there is no indication that they would include setting aside a judgment in favor of a private party because a disabled person was wrongfully excluded from the courtroom.

Pet. App. 19a.

The issue is clear, as both Maryland appellate courts agreed in this case, that the remedy that Petitioners seek with regard to the purported ADA violation in this case is not available, even if a trial court's exclusion of a disabled party from the courtroom based on concerns of jury prejudice *would* violate the ADA. Thus, Petitioners' ADA arguments are moot. The Court of Appeals further elaborated that:

> Indeed, the inappropriateness of such a remedy becomes unmistakably clear when one considers that a violation of the ADA based on wrongful exclusion from a courtroom does not depend on the excluded person's status as a party in the pending case; a member of the public who is excluded from a public courtroom because of his/her disability has the same complaint under the ADA as a party excluded by reason of disability.

Pet. App. 20a.

In sum, the Maryland Court of Appeals did not hold that a court's exclusion from the courtroom of a disabled party who cannot assist counsel or comprehend the proceedings does not violate Title II of the ADA. Thus, that is not the issue with regard to the ADA in this case that would be the subject of review. What the Court of Appeals *did* hold is that this issue is moot because neither the ADA nor the corresponding regulations provide the remedies that Petitioners seek. Accordingly, Petitioners' grievance may only properly be remedied by Congress, which is the only body that can provide the remedies that Petitioners seek for the ADA violations that they allege, rather than by this Court.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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App. 1

IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 1998

No. 538

DARWIN GREEN, A MINOR, etc., et al.

Appellants

vs.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., et al.

Appellees

APPEAL TO THE COURT OF SPECIAL APPEALS OF MARYLAND FROM A FINAL JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY (HONORABLE LAWRENCE H. RUSHWORTH)

APPELLANTS' BRIEF

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STATEMENT OF THE CASE

This is a medical malpractice action by the Appellant, Darwin Green, a disabled individual, through his parents and next friends, Teresa Johnson and Charles Johnson against the Appellees, Richard T. Fields, M.D., Stewart P. Axelbaum, M.D., Harshad R. Mody, M.D., and North Arundel Hospital Association, Inc. The Appellants' claim medical malpractice against Appellees, alleging that Appellees breached the standard of care by failing to properly diagnose Darwin Green's life threatening condition, and thereby prevent Darwin Green's subsequent injuries.

Originally, this case was brought in the Circuit Court for Baltimore City, styled *Darwin Green, et al. V. North Arundel Hospital Association, Inc., et al.*, no. 91340031/CL141283. At that time, the action was solely brought against Richard T. Fields, M.D. and North Arundel Hospital Association, Inc. On March 20, 1992 Judge Richard T. Rombro from the Circuit Court for Baltimore City ruled that the action was brought in the wrong venue. Judge Rombro proceeded to transfer the action to the Circuit Court for Anne Arundel County. (E-25 – E-43).

Subsequently, two additional defendants were added to the proceedings, Dr. Stewart P. Axelbaum and Dr. Harshad R. Mody. Dr. Mody maintained a medical office in Baltimore City. Once these additional defendants were added to the action, Appellants filed a motion to transfer the action back to the Circuit Court for Baltimore City, Appellants original choice of venue. Appellants' motion

to transfer was denied on August 2, 1996 by Judge Lawrence H. Rushworth of the Circuit Court for Anne Arundel County. (E47 – E-56).

On October 30, 1996 Judge Rushworth decided to bifurcate the issue of liability and damages, and a trial solely as to liability issues was scheduled for October 7, 1997. (E-11). Just prior to trial, on October 6, 1997 Judge Rushworth ruled that Darwin Green could not be present in the courtroom during the course of the trial. Judge Rushworth based his decision on Darwin Green's physical disability. (E-93 – E-114, E-134 – E-139).

The case proceeded to trial on October 7, 1997 before the Honorable Lawrence H. Rushworth. On October 17, 1997 Judge Rushworth granted Appellees' Motions for Judgment as to North Arundel Hospital and Dr. Mody. (E-1308 – E-1311). On October 21, 1997 the case proceeded to the jury. On that same day the jury returned a verdict in favor of Appellees, Richard T. Fields, M.D. and Stewart P. Axelbaum, M.D. (E-1587).

This appeal was then instituted.

QUESTIONS PRESENTED

I. Did the trial court in the Circuit Court for Baltimore City err as a matter of law in transferring Appellants' action to Anne Arundel County for improper venue?

II. Did the trial court in the Circuit court for Anne Arundel County err in denying Appellants' motion to transfer his action back to the Circuit Court for Baltimore City once Dr. Mody was added to the action?

III. Did the trial court err as a matter of law in barring the Plaintiff, Darwin Green from attending his own trial as a result of his physical and mental disability, in that such exclusion violated the Americans With Disabilities Act, as well as fundamental notions of equal access to justice?

IV. Did the trial court err in allowing Appellees to present a theory of their case that is against Maryland case law as stated in *Mehlman v. Powell*?

STATEMENT OF THE FACTS

Darwin Green was born on February 12, 1977. He was born with a medical condition called Arnold-Chiari malformation which left him with hydrocephalus (fluid on the brain). (E-231 – E-232). When Darwin was nine days old he had a shunt placed in the ventricle of his brain to release the build up of pressure caused by the hydrocephalus. (E-273, E-385). When he was approximately four and a half years old his shunt was intermittently functioning, and he had surgery to revise the shunt. (E-274 – E-275, E-385 – E-386).

Thereafter, Darwin did not experience any significant problems with his shunts. (E-234, E-385). He continued to develop and function relatively well. (E-385). Although his intellectual capability was somewhat limited, he attended school, did fairly well in his special education classes, and went on family vacations. (E-237 – E-239, E-278 – E-279, E-386).

On August 17, 1988, however, when Darwin Green was eleven years old he began to experience a headache.

(E-280, E-388). Darwin's father gave him Tylenol. (E-281, E-388). Later in the day on August 17, 1988 Darwin was still complaining about the same headache, which was unusual. (E-281 – E-282). Darwin began vomiting and felt nauseous. He wouldn't eat. (E-281 – E-282, E-388). On the morning of August 18, 1988 Darwin still had a headache and he was drowsy. (E-283, E-388). Darwin's parents were concerned, and Darwin's father, Charles Johnson took him to the emergency room at North Arundel Hospital Association. (E-284).

They arrived at the hospital at 11:05 A.M. and Dr. Richard T. Field was the physician on call at the emergency room. (E-388, E-1645, E-1647). Dr. Fields examined Darwin. (E-389, E-1647). After his examination at around 1:00 p.m. Darwin began to complain of a severe headache and then Dr. Fields ordered an emergency CT scan. (E-393, E-395).

Dr. Stewart P. Axelbaum is the radiologist who interpreted Darwin's CT scan. (E-400). Dr. Axelbaum's written report notes subdural hygroma with a calcified membrane causing some mass effect in the left cerebral hemisphere, large right parietal porecephalic cyst, possible aqueductal stenosis, bilateral shunts. (E-1648 – E-1649). Despite the remarkable nature of the CT scan, Dr. Axelbaum interpreted the CT scan as showing "all old" or "probably" old change. (E-1647 – E-1649). Darwin Green's medical expert, Dr. Buchholz testified that Dr. Axelbaum breached the standard of care when he reported that the changes were all old, because he failed to communicate to Dr. Fields the possibility of new change or a blocked shunt. (E-436).

Next, Dr. Fields consulted over the telephone with a neurologist, Dr. Harshad Mody. (E-401, E-1647). At 1:45 p.m. the hospital records note that "Dr. Mody feels the patient can go if headache relieved." (E-401, E-1647). During his emergency room stay Darwin was given Vicodin at around 1:28 p.m., a prescription pain killer. (E-393, E-402, E-1467). At 2:45 p.m., the hospital record indicates that the headache was gone. (E-1467). However, the administration of Vicodin made it difficult to determine whether the headache dissipated on its own or was simply suppressed by the potent oral narcotic. (E-407).

Dr. Field's shift at the hospital was to end at 3:00 p.m. and Dr. Field's calendar indicates that he had a party to attend. (E-1645). Merely twenty minutes after Darwin Green tells Dr. Fields that he no longer has a headache, at 3:05 p.m. Darwin is discharged from the hospital. (E-407, E-1647). The clinical impression noted on the hospital record is "vascular headache" and the instruction is for follow up with the child's primary care pediatrician, Dr. Lee. (E-408, E-1647). Darwin Green's medical expert Dr. Buchholz opined that the diagnosis of "vascular headache" is representative of the failure to recognize that Darwin Green had a more serious problem. (E-446). Moreover, Dr. Buchholz opined that Darwin Green should not have been sent home because he required the care of a neurosurgeon with regard to shunt malfunction and increased intracranial pressure. (E-448, E-478 – E-479).

At no time while Darwin was at North Arundel hospital did doctors at North Arundel Hospital diagnose Darwin as having shunt malfunctioning or shunt blockage. At no time while at North Arundel hospital did

doctors perform a shunt tap to determine if the shunt was malfunctioning. At no time while at North Arundel hospital did doctors call in a neurosurgeon or refer Darwin to a proper tertiary care facility for a determination of whether his shunt was malfunctioning or blocked. (E-611). At no time did doctors at North Arundel hospital tell Darwin's parents about the potential problems with Darwin's shunt. Darwin Green's medical expert, Dr. David Buchholz opined that Darwin's father should have been made aware of the issue of potential shunt malfunction and of the warning signs of this condition. (E-648).

After being released from North Arundel hospital at 3:05 p.m. on August 18, 1988 Darwin continued to complain of a headache and that evening his father gave him another Vicodin as prescribed by Dr. Fields. (E-459 – E-461). The next morning, August 19, 1988 Darwin still complained of a headache and his parents took him to his pediatrician, Dr. Lee. (E-241). Dr. Lee observed that Darwin had a headache, drowsiness and was not staggering, and he immediately arranged for Darwin's parents to take him to University of Maryland Hospital. (E-461 – E-463).

Doctors at the University of Maryland hospital correctly diagnosed Darwin as experiencing shunt malfunctioning or shunt blockage. (E-463 – E-464). He was admitted to the University of Maryland hospital on August 19, 1988. (E-242). Nonetheless, doctors at the University of Maryland did not operate on Darwin, and on August 20, 1988 he experienced cardiac arrest as a result of his shunt blockage. (E-464). Darwin was subsequently revived, however, he is now left in a chronic vegetative state. Darwin's current state of mental awareness is

unknown. He is unable to communicate. (E-246 – E-247, E-464).

Appellants' medical expert, Dr. David Buchholz testified at trial that Appellees breached the standard of care in failing to diagnose Darwin's shunt blockage at North Arundel Hospital. (E-422 – E-444, E-477). Moreover, if Darwin had received proper neurosurgical evaluation, including a shunt tap on August 18, 1988, and proper management from that point on, he would have avoided cardiac arrest that took place on August 20, 1988. (E-4842 – E-483).

ARGUMENT

I. The trial court in the Circuit Court for Baltimore City erred as a matter of law in transferring Appellants' action to Anne Arundel County for improper venue.

Maryland Code, Courts and judicial proceedings § 6-201 states as follows:

> (a) Civil actions. – Subject to the provisions of §§ 6-202 and 6-203 and unless otherwise provided by law, a civil action shall be brought on a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. In addition, a corporation also may be sued where it maintains its principal offices in the State.
>
> (b) Multiple Defendants. – If there is more than one defendant, and there is no single venue applicable to all defendants, under subsection (a), all may be sued in a county in which any one of them could be sued, or in a county in

> which any one of them could be sued, or in the county where the cause of action arose.

Maryland Code, Courts and Judicial Proceedings § 6-202 adds that *in addition to the venue provided in § 6-201* and § 6-203, an action *may be brought* in the indicated county:

(8) Tort action based on negligence – where the *cause of action arose.*

Hence, § 6-202 provides additional venue, at the Plaintiff's option. If multiple venues are proper then the Plaintiff possesses the right to choose the one in which to proceed. *Simmons v. Urguhart*, 101 Md. App. 85, 98 (1994), rev'd on other grounds, 339 Md. 1 (1995). Where either § 6-201 or § 6-202 is applicable, it is the Plaintiff's choice. See *Swanson v. Wilde*, 74 Md. App. 57 (1988).

Pursuant to the venue statute "where the cause of action arose" is a term of art. One does not have a cause of action merely because a negligent act or omission occurred. A cause of action only arises when there is some injury that results from the negligent act or omission. In other words, the cause of action does not arise until an individual has a right to judicial relief. An individual does not have a right to judicial relief until an injury has occurred.

For illustration, assume that handing someone a burning stick of dynamite is considered a negligent act. This negligent act occurs in county A. The dynamite has not yet exploded in county A and thus, the Plaintiff has not suffered any injury in county A as a result of the negligent act. At this point the Plaintiff has no cause of action to sue for the negligent act because he has not

suffered any injury and does not have a right for judicial relief. The Plaintiff then leaves county A and enters county B. At this point the dynamite explodes and the Plaintiff suffers physical injury. Now the Plaintiff has a right for judicial relief. Clearly, the cause of action arose in County B, despite the fact that the negligent act took place in county A.

Taking this illustration one step further, assume that it is County A Hospital's duty to put out the burning fuse on the stick of dynamite. County A Hospital fails to put out the burning fuse. While in county A the fuse is slowly burning down, but the dynamite has not yet exploded. At this point, Plaintiff cannot sue County A Hospital for breaching its' duty to put out the burning fuse, because Plaintiff has not yet suffered any injury as a result of County A Hospital's failure. Plaintiff does not yet have a cause of action. The Plaintiff then travels to county B with the still burning dynamite, and at that time the dynamite explodes. A cause of action finally arises against County A Hospital, but in county B venue.

This Court has stated that a cause of action in negligence requires evidence of duty owed by defendant to plaintiff, breach of that duty by defendant, injury to plaintiff, and injury proximately caused by defendant's breach. Thus, a "cause of action arises" in negligence when facts exist to support each element. *Owens-Illinois v. Eagle Picher Industries, Inc.*, 87 Md. App. 699, 724-25 (1991). In a negligence case the injury would be the last element to come into existence. *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 155 (1997).

Likewise, the Plaintiff, Darwin Green's cause of action did not arise until the Defendants' negligence proximately caused injury to the Plaintiff. Darwin Green did not experience injury as a result of the Defendants' negligent acts or omissions until his stay at the University of Maryland Hospital in Baltimore City, Maryland. Although the Defendants' negligent acts and omissions in failing to adequately diagnose and treat the Plaintiff occurred in Anne Arundel County, Darwin Green's "cause of action" did not arise until he suffered injury, cardiac arrest and resultant brain damage, in Baltimore City.

§ 6-202 provides for venue where the cause of action arose, not where the negligent act or omission occurred. The plain language of the statutes shows the intent of the legislature for venue to lie where the cause of action arose. If the legislature intended for venue to exist where the negligent act occurred, the language of the statute would have indicated this intent. Consequently, Judge Rombro's original ruling was incorrect pursuant to Maryland Code, Courts and Judicial Proceedings § 6-202 and this case must be remanded for a new trial in the Circuit Court for Baltimore City.

II. The trial court in the Circuit court for Anne Arundel County erred in denying Appellants' motion to transfer their action back to the Circuit court for Baltimore City once Dr. Mody was added to the action.

Judge Rushworth erred in failing to transfer the action back to the Circuit Court for Baltimore City once Defendant Mody was added to the action. When Plaintiff added two additional defendants, Harshad R. Mody,

M.D. and Stewart P. Axelbaum, M.D. to the action significant circumstances changed. The Defendant, Harshad R. Mody, M.D. carries on a regular business in his Baltimore City office at Harbor Hospital, 3001 South Hanover Street, Suite GNM1, Baltimore, Maryland 21225. (E-55 – E-56). One who engages regularly in business in one county may be sued there even though his principal place of business is in another county. *Dodge Park Enters v. Welsh*, 237 Md. 570 (1965).

Consequently, this additional defendant allows the action to fall under the province of Baltimore City venue pursuant to § 6-201 and § 6-202 of the Maryland Code, Courts and Judicial Proceedings article. Based on the fact that the Appellants originally brought their action in the Circuit Court for Baltimore City, Baltimore City has always been the Appellants' first choice of venue, the cause of action arose in Baltimore City and significant circumstances applicable to the venue statutes changed since Judge Rombro's original ruling, clearly allowing for Baltimore City Venue, it was plain error for Judge Rushworth not to transfer the action back to Baltimore City.

III. The trial court erred as a matter of law in barring the Plaintiff, Darwin Green from attending his own trial as a result of his physical and mental disability, in that such exclusion violated the Americans With Disabilities Act, as well as fundamental notions of equal access to justice.

Judge Rushworth violated Federally mandated statutory law when he barred Darwin Green from the courtroom and from attending his own trial. On July 26, 1990, President George Bush signed into law the Americans

with Disabilities Act,[1] law that specifically prohibits discrimination on the basis of physical or mental disabilities in employment, transportation, public accommodations, telecommunications and state and local government services. (hereafter entitled "ADA"). See 42 U.S.C. §12101 et seq. (1990). The act promotes the eradication of continuing unfair and unnecessary discrimination, segregation and prejudice against those having, or perceived as having, mental or physical disabilities. 42 U.S.C. §12101 (1992). One of the purposes of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. See *Tenbrink v. Federal Home Loan Bank,* 920 F. Supp. 1156 (1996). As with all Federal statutes barring discrimination, the ADA ensures disabled individuals the opportunity to take part in activities enjoyed by others. See *Alexander v. Pathfinder,* Inc., 906 F. Supp. 502, aff'd in part, rev'd in part 91 F.3d 59 (1995).

The ADA encompasses discrimination in employment (Title I, 42 U.S.C. §§ 12111-12117), public services (Title II, 42 U.S.C. §§ 12131-12165), and public accommodations and services operated by private entities (Title III, 42 U.S.C. §§ 12181-12189). In order to qualify for statutory protection under the ADA a person must be a "qualified individual with a disability." 42 USC § 12111(8) (1992); 28 C.F.R. §35.104 (1993). Qualified individuals with disabilities are those who: (a) have a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) have a record of such an impairment; or (c) are regarded as

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[1] The Act became effective January 26, 1992.

having such an impairment. 42 U.S.C. § 12102(2) (1992); 28 C.F.R. § 35.104 (1993). In the ADA, Congress included a wide-ranging definition of disability intended to cover those impairments that substantially limit "major life activities" such as caring for one's self, performing manual tasks, walking, seeing, hearing, breathing, learning, working, and participating in other reasonable activities. 28 C.F.R. § 35.104 (1993).

One of the most cherished beliefs of our system of government is equal access to justice. (See pages 20-21, infra). Congress by enacting the ADA sought to ameliorate court related discrimination by specifically including state and local courthouses within the definition of public services.[2] A public entity is defined in the Act as any state or local government, any department, agency, or instrumentality of a state of local government. 42 U.S.C. § 12131(1) (1990); 28 C.F.R. §35.104 (1993). Thus, the Circuit Court for Anne Arundel County is a public entity because it is a Department of state government. As a government entity, the state court system is required pursuant to the ADA to make all of its' services, programs, and activities available to qualified individuals with disabilities. *See People v. Caldwell*, 603 N.Y.S.2d 713 (1993). The ADA defines "qualified individual with a disability" as "an individual with a disability who, with

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[2] The ADA has been held to apply to the physical surroundings of a courthouse. *Kroll v. St. Charles County*, 766 F. Supp. 744 (E.D.Mo. 1991); *Layton v. Elder*, 143 F.3d 469 (8th Cir. Ark. 1998), In addition, a state judge who violated the ADA by not accommodating a handicapped person who needed special access to a restroom during trial was not immune from liability for this violation. *Livingston v. Guice*, 68 F.3d 460 (4th Cir. 1995).

or without reasonable modifications" is otherwise eligible to receive the government services in question. 42 U.S.C. § 12131(2) (1990).

Nondiscriminatory practices by public entities are covered under Title II of the ADA.[3] Part A of Title II and the Department of Justice regulations promulgated thereunder state as follows:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1990); 28 C.F.R. § 35.130(a) (1993).

The ADA regulations lay out the steps a public entity must take to ensure that it does not exclude persons with disabilities from enjoying the same benefits afforded to the general population. The regulations state, in pertinent part:

> (b)(1) A public entity, in providing any aid, benefit or service, may not, directly, or

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[3] Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which prohibits discrimination against disabled individuals by any program receiving public funds. 29 U.S.C. § 794 provides:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

> through contractual, licensing, or other arrangements, on the basis of disability –
>
> (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit or service;
>
> (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit or services that is not equal to that afforded others;
>
> (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as affective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided others.

28 C.F.R. § 35.130(a) (1993).

Therefore, each state and local court system may not use procedures, practices, or methods of administration that discriminate against any qualified individual with a disability.[4] This prohibition extends to all persons who meet the statutory definition, including those persons

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[4] To prevail on claim for violation of Title II of the Americans with Disabilities Act (ADA), plaintiff must show: that he is a qualified individual with disability; that he was either excluded from participation in or denied the benefits of some public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and that such exclusion, denial of benefits or discrimination was by reason of plaintiff's disability. 42 U.S.C. § 12132; *Weinreich v. Los Angeles County Metropolitan Transportation Authority*, 114 F.3d 976, 978 (9th Cir.1997). For ADA claims alleging discrimination on the basis of disability, the plaintiff carried the burden of proof. 42 U.S.C. § 12132.

who may appear to be prohibitively disabled from engaging in the particular service.[5] The ADA prohibits discriminatory effect regardless of a public entity's motive or intent. *Tyler v. City of Manhattan*, 857 F. Supp. 800, 814 (D. Kan. 1994). A qualified individual with a disability may bring an action under the ADA without exhausting federal administrative remedies. *Tyler*, 857 F. Supp. at 812.

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[5] Title 42 U.S.C. § 12134(a) authorizes the Attorney General to issue regulations to implement Title II of the ADA. Title 28 C.F.R. § 35.130 was promulgated pursuant to this authority. It states:

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out and individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of that service, program, or activity being offered. 28 C.F.R. § 35.130(b)(8).

Thus, public entities cannot use eligibility criteria that screen out, or tend to screen out, individuals with disabilities unless the criteria are necessary. Under this "necessity exception," public entities may utilize eligibility criteria that screen out, or tend to screen out, individuals with disabilities only if the criteria are necessary to insure the safe operation of the program or if the individual "poses a direct threat to the health or safety of others." 28 C.F.R. § 35.130(b)(8); Part 35, App. A, at 455 (1995).

Because Congress explicitly authorized the Attorney General to promulgate regulations under the ADA, see 42 U.S.C. § 12134(a), the Court must give these regulations "legislative and hence controlling weight: unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1984).

Undeniably, Darwin Green is a qualified individual with a disability. Judge Rushworth, acting as an agent of a public entity, wrongly discriminated against Darwin and prejudicially excluded Darwin from participating in his trial and aiding his attorneys, based solely on his disabilities. This is a blatant violation of the ADA and the very iniquitous act that the ADA seeks to eliminate.

So far, no court has resolved the issue of a party's exclusion from trial in light of the ADA. Nonetheless, the Supreme Court of Oklahoma noted:

> there may need to be a re-examination of those cases . . . which hold that a disfigured plaintiff may be excluded if he or she cannot aid the attorney or comprehend the proceedings. These cases were decided before the enactment of the Americans with Disabilities Act, a law that specifically prohibits discrimination on the basis of a physical or mental handicap.

Cary v. Oneok, Inc., 1997 Ok. 60, 940 P.2d 201 (1997).

Even prior to enactment of the American with Disabilities Act federal and state courts have consistently held that a party to a civil trial has a reasonable opportunity to attend its trial. In *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985) the eighth U.S. Federal Circuit Court observed that although the Due Process clause of the United States Constitution does not give a civil litigant the absolute right to be present personally during his trial, due process is offended if he is excluded arbitrarily or in the absence of extreme circumstances.[6] The

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[6] Maryland's State Constitution embodies the notion of due process. The Maryland Constitution, Declaration of Rights,

Court went on to conclude that a Plaintiff's physical appearance alone does not warrant his expulsion. *Helminski*, 766 F.2d at 215. The ideals behind due process and a fair trial permit a party to be present in the courtroom absent extreme conditions.

The possibility of juror sympathy alone is not tantamount to juror prejudice, and is insufficient to exclude a party from the courtroom. *Helminski*, 766 F.2d at 216. The

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Article 5 states in part that "the parties to any civil proceeding in which the right to a jury trial is preserved are entitled to a trial by jury of at least 6 jurors."

Article 19 states "that every man, for any injury done to him in his person or property, ought to have a remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land." This article has been characterized as a guarantee of due process. 63 Op. Atty. Gen. 246 (1978). "The law of the land" in this article is the same due process of law required by the Fourteenth Amendment to the Constitution of the United States. *In re Easton*, 214 Md. 176 (1957). This article guarantees access to the courts. *Johnson v. Maryland State Police*, 331 Md. 285 (1993).

Article 40 states: "the liberty of the press ought to be inviolably preserved; that every citizen of the state ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of the privilege." This article guarantees public access to court proceedings similar to that guaranteed by the First Amendment to the Constitution of the United States. *Baltimore Sun Co. v. Colbert*, 323 Md. 290 (1991).

Article 24 prohibits depravation of life, liberty, or property other than by judgment of his peers or by law of the land. This article embodies the United States constitutional concept of equal protection. *Renko v. McLean*, 346 Md. 464 (1996).

Helminski court set out that exclusion of a party is disfavored, and the party seeking exclusion must bear the burden of showing that only through exclusion can a fair trial be obtained. *Helminski*, 766 F.2d at 216. The requisite showing of prejudice cannot be satisfied simply by establishing that a Plaintiff has a physical or mental injury. The party seeking exclusion *must* show that the party's appearance or conduct is *likely to prevent the jury from performing its duty*. *Helminski*, 766 F.2d at 218.

Moreover, a jury will generally follow the court's instructions and decide a case based on the law presented. *Helminski*, 766 F.2d at 216. The likelihood of jury sympathy is not the equivalent of prejudice. A juror's sympathetic feeling toward a party does not necessarily lead to the conclusion that the jury will disregard the law to reach a verdict based on sympathy alone. *Helminski v. Ayerst Laboratories, Inc.*, 766 F.2d 208, 216 (1985). See also *Cary v. Oneok, Inc.*, 1997 OK 60, 940 P.2d 201, 205 (1997); *Mason v. Moore*, 641 N.Y.S.2d 195, 196 (1996). In the case sub judice, the court made no finding of fact that the jury would disregard the law and render a verdict based solely on Darwin's physical appearance.

The *Helminski* court then held that even if the party seeking exclusion meets its burden of showing prejudice, consistent with due process, a party still cannot be barred if the party can comprehend the proceedings or aid its attorney in the litigation. *Helminski*, 766 F.2d at 216.

In sum, under the *Helminski* test if the party's appearance does not prevent the jury from doing its job, then the party cannot be excluded from the courtroom. If the party's appearance is likely to prevent the jury from

doing its job then the court must still decide whether the party is able to understand the proceedings or can aid his counsel. Even if the party's appearance is likely to prevent a fair trial by affecting the jury's ability to decide the case on the facts, If the party can comprehend the proceedings or aid his counsel then he still cannot be excluded from the courtroom.[7]

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[7] Although Maryland Appellate Courts have never addressed the issue of excluding a party plaintiff from the courtroom based on physical appearance or mental status, and no court has fully addressed this issue since the enactment of the Americans With Disabilities Act, several states have addressed this issue prior to enactment of the ADA. Several courts have held that a party's physical appearance cannot be the sole basis for exclusion from the courtroom and does not amount to an extreme circumstance permitting exclusion. See *Carey v. Oneok, Inc.*, 1997 Ok. 60, 940 P2d 201 (Okla. 1997) (holding that exclusion of a severely burned and disfigured six year old child plaintiff from the courtroom was improper); *Florida Greyhound Lines, Inc. v. Jones*, 60 So.2d 396 (Fla. 1952) (holding that a party plaintiff on a stretcher, in a weakened, sickened and stupefied condition, attended by a nurse and hospital attendant was entitled to be present at trial, especially when the plaintiff happened to be unsightly from injuries which he was trying to prove the defendant negligently caused); *Mason v. Moore*, 64 N.Y.S.2d 195, 226 A. D.2d 993 (1996) (holding that a five year old brain damaged spastic quadriplegic with severe developmental delays and physical disability was entitled to be present at all stages of his trial when the basis for exclusion rested solely on a stereotypical assumption that a party's disability will prejudice the jury); *Marks v. Mobil Oil Corporation*, 562 F. Supp. 759 (E.D. Pa. 1983) (holding that a spastic paraplegic plaintiff confined to a wheelchair had a right to attend liability phase of personal injury trial, especially when his trial behavior was not disruptive); *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (1985) (holding that testimony indicating that a Plaintiff was not toilet trained, could not speak,

In the case sub judice, Darwin Green's attendance at trial was necessary to aid his counsel in establishing elements of liability. In order for a plaintiff to prove a cause of action in negligence, the plaintiff must establish the following:

1. That the defendant was under a duty to protect the plaintiff from injury;

2. That the defendant breached that duty;

3. That the plaintiff suffered actual injury or loss; and

4. That the loss or injury proximately resulted from the defendant's breach of the duty. *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124 (1996).

As a necessary part of Appellants' liability action, Appellants must prove that Darwin Green suffered actual loss proximately resulting from the Appellees' breach of duty. Clearly, Darwin Green's Physical condition has a bearing on the question of liability. Appellants alleged that Darwin Green's current condition proximately resulted from the Appellees' breach of duty. Consequently, it was necessary for Appellant's medical expert to explain to the jury, via the best example possible, that Darwin Green's current condition proximately resulted from the Defendant's breach of duty. See *Talcott v. Holl*, 224 So.2d 420 (Fla. 1969), cert. denied, 232 So.2d 181 (Fla.

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comprehend the proceedings, or assist counsel, and sometimes emitted frightening sounds was not sufficient to establish that the jury would be permitted from or substantially impaired in performing its duty).

1969) (A brain damaged plaintiff who alleged that her physician's negligence resulted in her condition was permitted to be present in court for a few minutes to demonstrate her condition. Specifically, the court permitted am expert witness to demonstrate the Plaintiff's condition by asking her certain questions to show her inability to speak or converse normally, and to request her to attempt certain motions to demonstrate her inability or limitations on such respects.)

In addition, Darwin Green needed to demonstrate to the jury his current condition in order to establish the "general harm" the danger of which the Appellees should have foreseen at the time they were treating Darwin. See *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124 (1996). This element is necessary in order to prove that the Appellees were the legal cause of Darwin Green's injuries. Moreover, allowing the jury to view the potential harm that in fact occurred to Darwin Green is necessary in order for the jury to establish the standard of care the Appellees were obligated to undertake. The best evidence to exhibit the injury causally related to the Appellees' negligence is Darwin Green himself.

Darwin Green must demonstrate his current condition in order to illustrate an element of the applicable standard of care involved in this specific case. The standard of care for the proper treatment of a patient is not cut and dry but rather is necessarily fluid depending upon differing circumstances. One vital element in determining the standard of care in a given circumstance is clearly the foreseeable possible consequence of committing an error. A case in which it is known to the physician that a mistake has a very high likelihood of devastating

injury to the patient must obviously be handled with the utmost care. The risk to the patient, at least in part, dictates the required caution to be exercised by the physician. A splinter must be removed more carefully from a brain than from a finger. What informs this exercise of care is the physician's awareness of foreseeable possible consequences of error.

It is thus, incumbent upon the Appellants to show just what those foreseeable consequences were. What more powerful illustration can the Appellants possibly make to the jury of the possible consequences which should have been in Appelleees' minds on August 18, 1988 than to show those consequences realized in fact in the person of Darwin Green? The image of Darwin Green as he exists today is what should have been in Dr. Field's mind in August 1988, guiding his decisions in Darwin's case. The jury has a right to see those possible consequences, which Appellees admit were foreseeable, in its evaluation of whether enough care was taken to avoid those consequences.

Obviously, Darwin Green's current physical and mental condition is the very condition he's trying to prove the Appellees negligently caused. Thus, Darwin Green is able to aid his attorneys in presenting his case with regard to establishing vital elements of his claim. Judge Rushworth's barring of Darwin Green from attending his own trial to demonstrate his condition prevented his attorneys from appropriately establishing the duty, standard of care, and proximate cause elements of his liability claim.

Finally, the Supreme Court of the United States has held that the First and Fourteenth Amendments clearly give the public a right of access to trials themselves, civil as well as criminal. *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980). See also, *In re Oliver*, 333 U.S. 257 (1948). "Historically and functionally open trials have been closely associated with the development of the fundamental procedure of trial by jury." *Richmond*, 448 U.S. at 589. "Open trials are the bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinions is an effective restraint on possible abuse of judicial power.' " *Richmond*, 448 U.S. at 592. Public trial guarantees safeguards against any attempts to employ our courts as instrument of persecution or for the suppression of political or religious heresies. *Id.*

If Darwin Green were not a party to this action, and were merely an observer, he would have had every right to public access to the court proceedings under United States constitutional and statutory law, as well as state constitutional law. It follows that Darwin Green had every right to be present in court as a party to this action, especially in light of the fact that Darwin Green would have been a necessary aid to his counsel in presenting elements of his liability claim. It was impermissible that he was kept from the courtroom, and kept from aiding his counsel in establishing his claim, solely because of his status as a party who is physically and mentally disabled. Darwin Green had every right to present at a trial that profoundly influence the rest of his life.

IV. The trial court erred in allowing Appellees to present a theory of their case that is against Maryland case law as stated in *Mehlman v. Powell.*

Throughout this litigation Appellants have always contended that North Arundel Hospital, Dr. Fields, Dr. Axelbaum and Dr. Mody were negligent and breached the proper standard of care by not correctly diagnosing Darwin Green's serious medical condition, and releasing him from the North Arundel Hospital emergency room to his home. It is Appellants' contention that if Appellees had correctly diagnosed Darwin's condition at North Arundel Hospital on August 18, 1988, necessary efforts could have been made at that time to save Appellant, and he more likely than not would not have suffered injury two days later at the University of Maryland Hospital on August 20, 1988. It has never been the Appellants' theory of the case that Appellees' breach of the standard of care negatively impacted or caused University of Maryland to be negligent. Nonetheless, Judge Rushworth allowed Appellants to present this theory of the case to the jury.

Specifically, Appellees' counsel informed the jury that they must decide whether the decision making at North Arundel hospital as to Darwin Green's condition caused the Doctors at the University of Maryland hospital to act unreasonably, thereby causing injury to Darwin Green. (E-202, E-215, E-224, E-1535, E-1550 – E-1552).

Just prior to trial Appellants made a motion in limine. Specifically the motion requested the court to exclude any discussion before the jury of negligence of University of Maryland Hospital or that the University of Maryland caused the injury or the cardiac arrest of Darwin Green. The basis of the motion was that the issue the jury needs

to consider is whether doctors at North Arundel hospital acted unreasonably in that Darwin Green's eventual injuries were foreseeable, and the doctors at North Arundel hospital failed to take proper steps within the standard of care to prevent those reasonably foreseeable injuries. It was Appellants' contention that Appellees failed to make the correct diagnosis of Darwin Green's condition, and that his condition could have been successfully treated had the correct diagnosis been made at North Arundel hospital. Appellants' counsel informed the court that the law of Maryland makes clear the even if Darwin Green went to a second health care provider, and it was negligent as well, that does not bar Darwin Green's recovery from the first health care provider. Clearly, the two providers presented concurring negligence. (E-114 – E-119).

Judge Rushworth denied the Appellant's motion in limine stating: "well clearly, the – that should be in front of the jury. It is a question of what bearing your own hospital [University of Maryland] had upon the injuries sustained by the Plaintiff. That is what we are going to talk about in the course of the trial." (E-119).

Plainly, this is not the law in Maryland and Judge Rushworth committed reversible error in allowing Appellees to present this defense to the jury. The judge clearly allowed Appellees throughout the trial to defend their position by allowing the jury to believe that any negligence on the part of the University of Maryland superseded Appellees' breach of the standard of care. Moreover, Appellees were allowed to argue that the only way the Appellees could be held responsible would be if the Appellees caused or influenced negligence on the part of the University of Maryland.

The Maryland Court of Appeals has fully addressed this very issue. In the case of *Mehlman v. Powell*, 281 Md. 269 (1977) the court of Appeals held that a doctor's failure to correctly diagnose a patient's condition is still a proximate and efficient cause of a patient's death, despite the fact that it may have been subsequently accompanied by negligent acts of others.

In that case the Plaintiff, William Powell experienced shortness of breath and was referred by his primary care physician to Dr. Edward Mehlman, a specialist in internal medicine. Dr. Mehlman gave Mr. Powell various diagnostic tests but failed to administer a perfusion lung scan. It was alleged that this lung scan would have revealed that Mr. Powell was suffering from pulmonary embolic disease and that this disease would have been successfully treated had the correct diagnosis been made. One month later Mr. Powell was unable to get out of bed and his wife took him to the hospital At the emergency room, Dr. Ruben Cosca ordered an electrocardiogram. Dr. Cosca's reading of the electrocardiogram was erroneous. Based on this erroneous reading, Dr. Cosca diagnosed Mr. Powell with pneumonitis, rather than the serious, life threatening condition of pulmonary embolism. It was claimed that Dr. Cosca should have known, based on a correct reading of the electrocardiogram, that Mr. Powell was in imminent danger of dying from heart failure due to pulmonary embolism. As a result of the incorrect diagnosis Mr. Powell was released from the hospital and returned to his home. Two days later, without receiving any further medical care, Mr. Powell died from pulmonary embolism.

On Appeal Dr. Cosca, the emergency room physician claims that the Plaintiffs failed to establish that Dr. Cosca's negligence was a proximate cause of Mr. Powell's death. Dr. Cosca alleged that the subsequent failure of Dr. Mehlman to acquaint himself with the true clinical condition of the decedent, as well as the alleged failure of an employee of the hospital to notify Dr. Cosca of a correct interpretation of Mr. Powell's electrocardiogram were intervening acts of negligence which interrupted the causal connection between Dr. Cosca's negligence and Mr. Powell's death.

The Court of Appeals held that "subsequent negligence would constitute a defense only if it were a superseding cause of the decedent's injury." *Mehlman v. Powell*, 281 Md. 269, 275 (1977). The Court stated:

> Dr. Cosca's failure to correctly interpret the decedent's electrocardiogram continued to be a proximate and efficient cause of the patient's death, despite the fact that it may have been subsequently accompanied by the negligent omissions of others. *The negligence of a third party, which merely operates along with a defendant's negligence, presents an ordinary case of concurring negligence and does not affect the liability of the defendant.*

Mehlman v. Powell, 281 Md. 269, 276 (1977) (emphasis added).

In *Banks v. Iron Hustler Corp.*, 59 Md. App. 408, 431 (1984) the Court of Special Appeals established that the issue of whether the intervening act of a third party suffices as a superseding cause to relieve liability of the

first actor *is a question of law only when the evidence presented and the logical inferences deducible therefrom admit of but one conclusion.* See also *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124, 141 (1996); *Caroline v. Reicher*, 269 Md. 125, 131 (1973); *Segerman v. Jones*, 256 Md. 109 (1969). Consequently, Judge Rushworth committed an error law of by letting Appellees use a defense strategy of conveying to the jury that Appellees were not to blame for any foreseeable injury to Darwin Green because of the subsequent negligent acts of doctors at the University of Maryland hospital.

Based on Judge Rushworth's error of law in believing that if doctors attending Darwin Green at the University of Maryland hospital were negligent, then Doctors at North Arundel hospital should be relieved of liability, Judge Rushworth prevented Appellants from adequately presenting their evidence of Appellees' negligence to the jury. First, Judge Rushworth refused to allow Appellants' medical expert Dr. David Buchholz to testify as to foreseeability of the general harm associated with Darwin Green's condition as presented on August 18, 1988. (E-646). This evidence, of whether the general type of harm sustained was foreseeable, was necessary to determine whether a duty exists, the appropriate standard of care, as well to determine proximate cause. *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124, 139-45 (1996).

In addition, Judge Rushworth refused to allow Appellants' medical expert Dr. David Buchholz to testify that Appellees' negligence was a substantial factor in causing Darwin Green's injuries, and refused to allow Dr.

Buchholz to testify as to Darwin Green's present condition as it related to events at North Arundel hospital. He also refused to allow Dr. Buchholz to testify that Darwin Green's present condition could have been avoided had the standard of care been met at North Arundel Hospital. (E-468 – E-472, E-642 – E-644). In fact, Judge Rushworth refused to let in evidence as to Darwin Green's current condition. (E-243 – E-247). Again, this evidence was necessary to establish proximate cause on the part of Appellees. *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124, 138-39 (1996).

Finally, Judge Rushworth incorrectly instructed the jury, through his pattern of instructions, that if the University of Maryland were negligent then Appellees were not negligent. Plainly, this is contrary to the law of concurring negligence as set out in *Mehlman v. Powell*, 281 Md. 269 (1977). Specifically, Judge Rushworth instructed: "for the plaintiff to sustain their burden of proof, they must by a preponderance of affirmative facts proven to your satisfaction that the injuries of which the plaintiff complains resulted from the alleged negligence of the defendant *and not from any other cause.*" (E-1478). In addition, Judge Rushworth instructed that "a physician is not liable for lack of success or *an honest mistake* or exercising judgment even if hindsight showed a different course would have been preferred. Physicians are allowed a wide range of exercise of their judgment and discretion." (E-1479). Then Judge Rushworth added that "you must not hold Drs. Fields and Axelbaum liable unless you find their conduct, their individual conduct was *clearly* not within the standard of care." (E-1479). Plainly, Judge Rushworth incorrectly instructed the jury that plaintiff

must prove that the doctors breached the standard of care by clear and convincing evidence, as opposed to the legally correct standard of a preponderance of the evidence. Moreover, he incorrectly instructed the jury that honest mistakes encompass a doctor's standard of care.

In conjunction with these erroneous instructions, Judge Rushworth refused to give Plaintiff's requested jury instruction no. 23. This jury instruction stated as follows:

> Members of the jury, you are instructed as a matter of law that the Defendants are liable to the Plaintiff for all injuries resulting from their negligence including specifically and injuries he Plaintiff may have suffered as the result of ongoing treatment necessitated by his original or initial condition.
>
> The rationale of the law is to prevent the responsible Defendant from seeking an avenue of escape from liability and responsibility by attempting to show that the subsequent treatment was not the best, was provided by a practitioner who lacked skill, or was negligent. This the law will not permit.
>
> Accordingly, even if Darwin Green received treatment for his condition which was not the best, furnished by a practitioner who lacked skill, or was even negligent, resulting in his injuries, the Defendants are responsible for all such injuries and damages. The defendants are not permitted to attempt to lessen or reduce its liability and responsibility to the Plaintiff for all injuries sustained by pointing to some subsequent treatment that Darwin Green may have had which created the injuries.

Kaplan v. Stein, 198 Md. 414, 84 A.2d 81 (1951).

Trieschman v. Eaton, 224 Md. 111, 166 A.2d 892 (1961).

Mehlman v. Powell, 281 Md. 269, 378 A.2d (1977)

This instructor correctly sets out the law applicable to the Appellants' theory of their case. It was error for the trial court to refuse to instruct the jury as to this theory when such theory is a correct statement of the law, and there is testimony which supports it. *Levine v. Rendler*, 272 Md. 1, 13 (1974); *Kelbaugh v. Mills*, 108 Md. App. 89, 94. Refusal to give this applicable instruction which was not covered by other instructions is grounds for reversal because such error was material and prejudicial.

Judge Rushworth further erred by not letting Appellants enter into evidence Dr. Field's calendar showing that he had a party to go to on the day he was treating Darwin Green. It is surely Appellants' right for the jury to be able to consider whether Dr. Fields was rushing to leave the hospital to attend a party, and therefore, failed to act within the proper standard of care. (E-123 – E-126, E-763 – E-766, E-1645).

Finally, Judge Rushworth refused to allow Appellants to enter into evidence an affidavit signed by Dr. Fields in which Dr. Fields attested under oath that North Arundel Hospital did not have proper equipment or facilities to perform a shunt tap. Later, Dr. Fields testified at his deposition that the hospital in fact had such equipment. (E-179 – E-180, E-420 E-422, E-929 – E-934, E-755 – E-763, E-1643 – E-1644). Clearly, the affidavit was admissible to show a prior inconsistent statement, to impeach the witness, and to allow the jury to properly assess Dr. Field's

credibility. See *Tyler v. States*, 105 Md. App. 495, 531 (1995); *Stewart v. State*, 342 Md. 230 (1996).

Based on all of these errors of law, Appellants were prevented from properly presenting to the jury their theory of the case, as well as evidence to support their theory of the case. Instead, the court allowed Appellees to present to the jury a defense strategy clearly in contradiction to Maryland case law. Consequently, this case must be remanded for a new trial.

CONCLUSION

For the reasons enumerated herein, the Appellants respectfully requests this Honorable Court to find that the trial court committed reversible error, and remand this case for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18'th day of September, 1998 a copy of the aforegoing document was mailed, postage prepaid to:

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